Jan 28 2000

(1)

No. 99-5525

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

IN THE
Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JAMES W. HUNDLEY *
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

PAUL F. WASHINGTON
75 Rockefeller Plaza
New York, New York 10019
(212) 484-6753

Counsel for Petitioner

* Counsel of Record

January 28, 2000

58 pp

QUESTION PRESENTED

Whether Congress' enactment of 18 U.S.C. § 3501 constitutes an unconstitutional attempt legislatively to narrow the protections in the Self-Incrimination Clause of the Fifth Amendment embodied in this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	4
B. Procedural Background	6
C. Statutory Background	9
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. *MIRANDA* ENUNCIATED A CONSTITUTIONAL RULE THAT CANNOT BE REVERSED BY CONGRESS	13
A. *Miranda*'s Core Constitutional Holdings	13
B. The Court's Subsequent Application Of *Miranda* To The States And On Habeas	20
C. *Miranda*'s "Prophylactic" Rules Have Constitutional Weight	22
D. Section 3501 Is Constitutionally Infirm	27
II. THERE IS NO REASON TO DISLODGE *MIRANDA*'S CONSTITUTIONAL RULING	30
A. Workability	31

TABLE OF CONTENTS—Continued

	Page
B. Reliance	33
C. Subsequent Doctrinal Developments	34
D. Unchanged Factual Premises	36
E. *Miranda* Is Not "Unsound In Principle"	37
F. Considerations That Transcend Traditional Factors	44
CONCLUSION	46

TABLE OF AUTHORITIES

CASES

	Page
Arizona v. *Roberson*, 486 U.S. 675 (1988)	21
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	32, 34
Blackburn v. *Alabama*, 361 U.S. 199 (1960)	41
Blackledge v. *Perry*, 417 U.S. 21 (1974)	26
Bram v. *United States*, 168 U.S. 532 (1897)	41
Butler v. *McKellar*, 494 U.S. 407 (1990)	20
Carter v. *Kentucky*, 450 U.S. 288 (1981)	40
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	29
Colorado v. *Connelly*, 479 U.S. 157 (1986)	41
Cooper v. *Dupnik*, 963 F.2d 1220 (9th Cir. 1992)	36
Culombe v. *Connecticut*, 367 U.S. 568 (1961)	41
Davis v. *United States*, 512 U.S. 452 (1994)	10, 35
Doe v. *United States*, 487 U.S. 201 (1988)	40
Edwards v. *Arizona*, 451 U.S. 477 (1981)	20, 34
Escobedo v. *Illinois*, 378 U.S. 478 (1964)	15, 27
Fare v. *Michael C.*, 442 U.S. 707 (1979)	32
Freedman v. *Maryland*, 380 U.S. 51 (1965)	25
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)	31, 37
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	24
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	15, 40
Greenwald v. *Wisconsin*, 390 U.S. 519 (1968)	41
Griffin v. *California*, 380 U.S. 609 (1965)	40
Harris v. *Rivera*, 454 U.S. 339 (1981)	21
Illinois v. *Perkins*, 496 U.S. 292 (1990)	20
Lisenba v. *California*, 314 U.S. 219 (1941)	41
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)	26
Maine v. *Moulton*, 474 U.S. 159 (1985)	26
Malloy v. *Hogan*, 378 U.S. 1 (1964)	15
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)	30
Massiah v. *United States*, 377 U.S. 201 (1964)	15, 28
McNabb v. *United States*, 318 U.S. 332 (1943)	21
Michigan v. *Harvey*, 494 U.S. 344 (1990)	27, 32, 34
Michigan v. *Jackson*, 475 U.S. 625 (1986)	20, 26, 27
Michigan v. *Payne*, 412 U.S. 47 (1973)	26
Michigan v. *Tucker*, 417 U.S. 433 (1974)	17, 21, 23, 35

TABLE OF AUTHORITIES—Continued

	Page
Mincey v. *Arizona*, 437 U.S. 385 (1978)	41
Minnick v. *Mississippi*, 498 U.S. 146 (1990)	21, 29, 34, 35, 37
Miranda v. *Arizona*, 384 U.S. 436 (1966)	*passim*
Mitchell v. *United States*, 119 S. Ct. 1307 (1999)	44
Moran v. *Burbine*, 475 U.S. 412 (1986)	20, 32, 45
Mu'Min v. *Virginia*, 500 U.S. 415 (1991)	21
New York v. *Quarles*, 467 U.S. 649 (1984)	24, 32, 36
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1954)	24
North Carolina v. *Pearce*, 395 U.S. 711 (1969)	26
Oregon v. *Elstad*, 470 U.S. 298 (1985)	21, 24, 25, 35
Oregon v. *Haas*, 420 U.S. 714 (1975)	25
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989)	31, 34
Payne v. *Arkansas*, 356 U.S. 560 (1958)	41
Payne v. *Tennessee*, 501 U.S. 808 (1991)	30, 31
Pennsylvania v. *Muniz*, 496 U.S. 582 (1990)	34
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992)	30, 31, 33, 36, 45
Rhode Island v. *Innis*, 446 U.S. 291 (1980)	32
Rock v. *Arkansas*, 483 U.S. 44 (1987)	40
Stansbury v. *California*, 511 U.S. 318 (1994)	21
Tennessee v. *Street*, 471 U.S. 409 (1985)	25
United States v. *Balsys*, 118 S. Ct. 2218 (1998)	38, 39, 43
United States v. *International Bus. Mach. Corp.*, 517 U.S. 843 (1996)	30
United States v. *Leon*, 468 U.S. 897 (1984)	25
United States v. *Title Ins. & Trust Co.*, 265 U.S. 472 (1924)	31
Vasquez v. *Hillary*, 474 U.S. 254 (1986)	30, 31
Weaver v. *Brenner*, 40 F.3d 527 (2d Cir. 1994)	36
Withrow v. *Williams*, 507 U.S. 680 (1993)	22, 40
Wong Sun v. *United States*, 371 U.S. 471 (1963)	28

CONSTITUTION

U.S. Const. amend. V	2, 38

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES

	Page
2 U.S.C. § 288k(b)	10
18 U.S.C. § 3501	2, 9, 28
28 U.S.C. § 2254(a)	22

CONGRESSIONAL HISTORY

114 Cong. Rec. 16,074 (1968)	10
114 Cong. Rec. 16,295 (1968)	10
S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112	10, 27

SCHOLARLY AUTHORITIES

Stephen I. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987)	14
Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 Cornell L. Rev. (forthcoming 2000)	28

OTHER AUTHORITIES

Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination* 181 (R.H. Helmholz et al. eds., 1997)	39, 40
Joan Biskupic, *High Court to Reconsider Miranda Ruling*, Wash. Post, Dec. 7, 1999, at A1	4
Michael Dorman, *Imagine You're Arrested. First They Read Your Rights. (Right?)*, Newsday, Oct. 14, 1999, at A25	4
Charles M. Gray, *Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries, in The Privilege Against Self-Incrimination* 47 (R.H. Helmholz et al. eds., 1997)	40
Orrin G. Hatch, *Miranda Warnings and Voluntary Confessions Can Co-Exist*, Wall St. J., Dec. 13, 1999, at A35	4
R.H. Helmholz, *Introduction, in The Privilege Against Self-Incrimination* 1 (R.H. Helmholz et al. eds., 1997)	39

TABLE OF AUTHORITIES—Continued

Page

R.H. Helmholz, *The Privilege and the Jus Commune: The Middle Ages to the Seventeenth Century, in The Privilege Against Self-Incrimination* 17 (R.H. Helmholz et al. eds., 1997) 40

John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, in The Privilege Against Self-Incrimination* 82 (R.H. Helmholz et al. eds., 1997) 39, 40

Tony Mauro, *Supreme Court Agrees to Revisit Miranda Warning*, USA Today, Dec. 7, 1999, at 4A 4

Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination* 109 (R.H. Helmholz et al. eds., 1997) 38, 39

Stephen Seplow, *Miranda Rights Case Revisited*, Dayton Daily News, Nov. 25, 1999, at 2A 4

Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins, in The Privilege Against Self-Incrimination* 145 (R.H. Helmholz et al. eds., 1997) 38

IN THE

Supreme Court of the United States

No. 99-5525

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 166 F.3d 667 (4th Cir. 1999), and is reproduced in the Joint Appendix (J.A.) at 162-225. That opinion reversed an unpublished opinion and order of the district court, reproduced in the J.A. at 139-55. Following the district court's ruling, both the government and petitioner filed motions requesting that the district court reconsider aspects of its initial ruling. J.A. 75-85, 86-100. The district court's opinion and order denying both motions is reported at 971 F. Supp. 1023 (E.D. Va. 1997) and is reproduced in the J.A. at 156-61.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on February 8, 1999. The petitioner

filed a Petition for Rehearing and Petition for Rehearing En Banc which the Fourth Circuit denied on April 1, 1999. The Court extended the time for filing the Petition for Certiorari until July 30, 1999. The Petition for Certiorari was filed on July 30, 1999, and the Court granted the Petition for Certiorari on December 6, 1999. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V; 18 U.S.C. § 3501.[1]

STATEMENT OF THE CASE

The issue in this case is whether this Court's landmark holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which precludes admitting into evidence unwarned statements made by an individual during a custodial interrogation, is based on the Fifth Amendment and therefore beyond the power of Congress to overrule statutorily. The district court found that certain statements of petitioner, Charles Thomas Dickerson, were unwarned and therefore inadmissible under *Miranda*. The Fourth Circuit, *sua sponte*, held that Congress, in enacting § 3501, superseded *Miranda*'s warning requirements. Accordingly, the Fourth Circuit applied § 3501's "totality of the circumstances" test to determine the admissibility of petitioner's statements.

The Fourth Circuit erred. Pursuant to *Miranda* and its progeny, the Fifth Amendment's privilege against self-incrimination is not solely a privilege to be free from abuse at the station house. It is also a privilege not to become an unwitting or unwilling witness against oneself while being subjected to the pressures inherent in cus-

[1] The text of the pertinent constitutional and statutory provisions is reproduced in the Appendix ("App.") to this brief.

todial interrogation. Accordingly, *Miranda*'s minimum constitutional threshold requires that an individual be apprised of his rights, that officials respect the exercise of those rights and that any waiver be knowingly, intelligently and voluntarily made before a statement made to law enforcement officials during custodial interrogation may be admitted in the prosecution's case-in-chief.

Incriminating statements therefore are admissible only if they are made in the absence of overt coercion *and* after warnings or other procedures fully effective in apprising persons of their rights. Without knowledge on the part of the individual being questioned as to what choices are available to him, statements cannot be deemed truly voluntary. If the government is allowed to keep its suspect in a state of ignorance, the Fifth Amendment protections are reduced to a mere " 'form of words.' " *Miranda*, 384 U.S. at 444 (quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920)). Section 3501, which makes apprising an individual of his rights merely optional, directly contradicts *Miranda*'s minimum threshold requirement that an individual be apprised of his rights and that the exercise of those rights be respected. Because *Miranda*'s minimum threshold is a matter of constitutional law, and because *stare decisis* requires continued adherence to *Miranda*'s threshold requirements, § 3501 is invalid.

Given the notoriety of this matter, it should be noted at the outset that petitioner has not been (and never before has been) convicted of bank robbery in this or any other case. This matter is before the Court on a successful suppression motion and no trial has been held. Petitioner therefore is entitled to the full protections of the presumption that he is innocent. Moreover, contrary to numerous

and nationwide media reports,[2] petitioner did not confess to any bank robbery, much less "multiple" bank robberies. His "statements" concerned only his whereabouts and activities. Nor has petitioner been "let off on a technicality." Petitioner remains under indictment. At this point only the statements petitioner made in custody remain suppressed.

A. Factual Background.

The facts material to consideration of the question presented are as follows: On January 24, 1997, a First Virginia Bank in Alexandria, Virginia was robbed. Witnesses saw the robber, later identified as James Rochester, leave the bank and enter an Oldsmobile Cierra. Using the description of the getaway car, including its license plate number, the FBI determined that petitioner was the car's owner.

At approximately 5:30 p.m. on the evening of January 27, 1997, law enforcement officers went to petitioner's home in Takoma Park, Maryland. An Oldsmobile Cierra registered to petitioner was parked in the vicinity. The officers set up surveillance. After waiting for more than an hour, they knocked on petitioner's door. Approximately ten FBI agents and local police officers arrived at the door of petitioner's apartment, some with guns drawn, as he opened the door. Three or four, including Special FBI Agent Lawlor, entered petitioner's apartment without

---

[2] *See* Michael Dorman, *Imagine You're Arrested. First, They Read Your Rights. (Right?)*, Newsday, Oct. 14, 1999, at A25; Stephen Seplow, *Miranda Rights Case Revisited*, Dayton Daily News, Nov. 25, 1999, at 2A; Tony Mauro, *Supreme Court Agrees to Revisit Miranda Warning*, USA Today, Dec. 7, 1999, at 4A; Joan Biskupic, *High Court to Reconsider Miranda Ruling*, Wash. Post, Dec. 7, 1999, at A1: Orrin G. Hatch, *Miranda Warnings and Voluntary Confessions Can Co-Exist*, Wall St. J., Dec. 13, 1999, at A35.

a warrant and without his consent. The officers asked him to accompany them to the FBI field office in Washington, D.C. Only when leaving did the officers ask petitioner whether he would consent to a search of the residence. He refused and was driven by the officers to the FBI field office.

Once at the field office, Agent Lawlor and another FBI agent interviewed petitioner. He was not advised of his *Miranda* rights prior to this interrogation. Petitioner denied any knowledge of incidents that might relate to the robbery. He admitted only that he had been in the vicinity of the bank at the time it was robbed. After obtaining this statement, Agent Lawlor left the interrogation room and telephoned a United States Magistrate Judge for the District of Maryland to obtain a search warrant for petitioner's home. The warrant issued at 8:50 p.m.

After obtaining the warrant, Agent Lawlor returned to the interrogation room and told petitioner that his home was going to be searched. Petitioner then made another statement, still denying his involvement, but providing information about James ("Jimmy") Rochester, the man who had committed the robbery.[3] It was only after

---

[3] Petitioner's statement to the agent was as follows: Petitioner had gone to Alexandria on January 24, 1997, with a man named Jimmy. Petitioner knew Jimmy because Jimmy was married to petitioner's cousin. Petitioner further stated that, while in Alexandria, he parked his car and went into a bagel shop. Initially, Jimmy waited in the car, but as petitioner walked away, he saw Jimmy get out of the car. When petitioner returned to his car, Jimmy was already back in it. When petitioner began to drive away, Jimmy told him to pull over. He complied, thinking Jimmy had to use the bathroom. Jimmy got out and returned after a few minutes. When petitioner stopped at a stop sign, Jimmy got out of the car and put something in the trunk. When petitioner again stopped at a red light a short distance down the street, Jimmy told him to run it. It was at this point that petitioner began to suspect

giving this statement that petitioner was, for the first time, advised of his rights as mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This was done using a rights waiver form which petitioner signed. After completing this form, petitioner was formally placed under arrest. He then left the field office with the agents and showed them Rochester's apartment in Oxon Hill, Maryland. Based on this information, the FBI arrested James Rochester, who was a suspect in connection with a number of bank robberies in various states on the east coast. Following his arrest, James Rochester admitted that he had robbed several banks, including the First Virginia Bank in Alexandria on January 24, 1997. Petitioner was charged with one count of conspiracy to commit bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and three counts of using a firearm during a bank robbery in violation of 18 U.S.C. § 924(c).[4]

B. Procedural Background.

Petitioner filed a motion to suppress the statements given at the FBI field office. After careful examination of the facts as presented by both petitioner and the prosecution, the district court granted the motion. Regarding the statements, the district court observed that Agent Lawlor had obtained a search warrant for petitioner's residence at 8:50 p.m. At the suppression hearing, Agent Lawlor testified that when he informed petitioner about the warrant, petitioner reacted by saying he wanted to make a further statement. It was at this point, Agent

---

that Jimmy may have committed a robbery. Petitioner knew that Jimmy had come to the Washington, D.C. area after committing a number of robberies in Georgia.

[4] A superseding indictment was issued on June 24, 1997. It charged the same offenses except it alleged that petitioner acted as an aider and abettor to the bank robberies and firearm offenses in violation of 18 U.S.C. § 2. *See* J.A. 27.

Lawlor said, he "Mirandized" petitioner and obtained a signed waiver form. Although, at most, only a few minutes had passed since the warrant was issued, the time written on petitioner's waiver form was 9:41 p.m. The district court found that "Agent Lawlor's testimony is in direct conflict with the documentary evidence, which shows that the warrant issued at 8:50 p.m., and [petitioner's] testimony that he was Mirandized at the end of 'a half hour' long interview." J.A. 155. The court suppressed petitioner's statements, finding that Dickerson was not advised of his *Miranda* rights until after he had completed his statement." *Id.*[5]

The parties filed cross-motions for reconsideration, which the district court denied. J.A. 75-85, 86-100.[6] The

---

[5] Central to the district court's ruling was its finding that "the content of Agent Lawlor's testimony, which was impeached by the government's own exhibits, and his demeanor lacked credibility." J.A. 152 n.7. As an example, the court observed that Agent Lawlor "dodged questions" about whether officers entered petitioner's home with their guns drawn, even though the officers had taken an hour to plan their entry and after petitioner had initially stalled when the officers first knocked and announced themselves. *Id.* Agent Lawlor also testified that petitioner was not under arrest when this group of officers took him from Maryland to the FBI field office in Southwestern D.C. and therefore *Miranda* warnings were unnecessary. The district court specifically noted that it made a "first hand assessment of witness credibility, based on demeanor, voice inflection and a totality of other factors not well reflected by an inanimate record, for which the district court is uniquely suited." *Id.* (citing cases).

[6] In their cross-motion, prosecutors attached an affidavit from Agent Durkin that contradicted Agent Lawlor's testimony. J.A. 101-04. The affidavit stated that petitioner had initially refused to give a statement after Agent Lawlor told him about the warrant, and that petitioner did not make a statement until after the search was concluded. *Id.* at 102-03. Prosecutors also attached a handwritten statement from petitioner (separate from the "9:41 pm" waiver form) in which petitioner wrote that he had been read his rights at 7:30 pm and denied involvement. *Id.* at 105. This statement, however, is plainly incorrect as to time in that petitioner also

district court did not address § 3501 in either of its orders, nor did it make any specific finding as to whether petitioner's statements were voluntary.

A divided panel of the Fourth Circuit Court of Appeals reversed the district court. The Fourth Circuit held that it had discretion to consider § 3501's applicability, despite the fact that no party had raised the issue. In explaining this unusual exercise of discretion, the court of appeals observed that in recent years "career prosecutors" (but not the Department of Justice), political groups and politicians had repeatedly urged the court of appeals to address § 3501. J.A. 188 ("[T]he Washington Legal Foundation and the Safe Streets Coalition . . . . took the government to task . . . . As a result, we ordered the Department of Justice to address the effect of § 3501.") (citing *United States* v. *Leong*, 116 F.3d 1474 (4th Cir. 1997) (table)). In the instant case, because the Department of Justice had expressed its view that § 3501 was unconstitutional, and in order to ensure " 'the proper administration of the criminal law,' " *id.* at 189, the Fourth Circuit determined it would accede to the urgings of *amici*.

In examining *Miranda*, the Fourth Circuit was surprised that "the sixty-page opinion does not specifically state the basis for its holding." J.A. 202. The court, however, found that the opinion "strongly suggested . . . that the basis for the rule was identical to that set forth in *McNabb* and *Malloy*," *id.*, *i.e.*, an exercise of the Court's

---

states he was brought to the FBI field office at 5:30 p.m. Officers only arrived at petitioner's apartment at 5:30 pm and did not knock and enter until "over an hour" later. Though the times given in the statement are demonstrably inaccurate, the statement is consistent with petitioner's tesimony that there was a two-hour gap between petitioner's arrival at the field office and his being apprised of his rights. In denying the cross-motion, the district court ruled that the government had not proffered any "new and heretofore unavailable evidence supporting reversal of this Court's July 1, 1997 Order." *Id.* at 161.

power "to prescribe nonconstitutional 'rules of procedure and evidence.' " *Id.* at 200 (quoting *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959)).

The Fourth Circuit conceded that Congress, in enacting § 3501, had the "express purpose of returning to the pre-*Miranda* case-by-case determination of whether a confession was voluntary." J.A. 199. Nonetheless, the court of appeals concluded that Congress had the authority to do so. In addition to the court of appeal's conclusion that *Miranda*'s holding was an exercise of only supervisory powers, the Fourth Circuit also cited subsequent cases from the Court describing *Miranda*'s rules as "prophylactic." *Id.* at 203-07. However, the Fourth Circuit cited only its own opinion in declaring that "it is certainly 'well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation.' " *Id.* at 207 (quoting *United States* v. *Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997)). In response to the dissent's objection that *Miranda*'s application in state cases proves its constitutional force, the Fourth Circuit merely said "the dissent raises an interesting academic question." *Id.* at 208 n.21.

C. Statutory Background.

Congress enacted 18 U.S.C. § 3501 on June 19, 1968, just two years after the Court issued *Miranda*. Under § 3501, whether a confession is "voluntarily given" and therefore admissible is to be determined by the trial judge, "tak[ing] into consideration all the circumstances surrounding the giving of the confession." *Id.* § 3501(b). On its face, the statute directly conflicts with *Miranda*'s holding that a statement made in custodial interrogation is inadmissible unless "the accused [is] adequately and effectively apprised of his rights and the exercise of those rights [is] fully honored." 384 U.S. at 467. This conflict was intentional. Congress enacted § 3501 to replace *Miranda*'s standard for determining whether a statement is

admissible under the Fifth Amendment with a broader totality of the circumstances test. See S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2141; see *id.* at 2210-11.

Congress also left no doubt that *Miranda*'s holding that the accused be apprised of his rights was a matter of constitutional interpretation. The Senate Judiciary Committee expressed its view that *Miranda*'s "majority opinion . . . misconstrues the Constitution." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. at 2136. Section 3501 further reflected the mistaken view that Congress could override the Court on such constitutional rulings: "I say that we would be derelict in our duty if we as Representatives of the people did not declare once and for all the equality of this Congress of the United States with the Supreme Court of the United States and put the Court in its place." 114 Cong. Rec. 16.074 (1968) (statement of Rep. Whitten); see *id.* at 16.295 (statement of Rep. Reid) ("In my judgment, this title constitutes an emotional backlash at the Supreme Court").

Precisely because of § 3501's unconstitutionality, the Executive Branch has largely refused to enforce it since it was enacted over thirty years ago. See *Davis* v. *United States*, 512 U.S. 452, 463-64 (1994) (Scalia, J. concurring) (noting that "[i]n fact, with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment 25 years ago"). Pursuant to 2 U.S.C. § 288k(b) (requiring the Department of Justice to notify Congress whenever it will not defend the constitutionality of a federal statute), Attorney General Janet Reno has notified Congress that the Department will not defend the constitutionality of § 3501. See J.A. 188. For the past 33 years, therefore, *Miranda*, not § 3501.

has governed the admissibility at trial of statements procured during custodial interrogation.

SUMMARY OF ARGUMENT

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court engaged in a conventional exercise of constitutional interpretation. The Court held that the Fifth Amendment privilege against self-incrimination is fully applicable to custodial interrogation. After reviewing the scope of the privilege, the Court concluded that it secures for individuals the right to make a free, intelligent choice regarding whether to talk, or not talk, to law enforcement officers during interrogations. Therefore, to permit a full opportunity to exercise the privilege and to overcome pressures inherent in the custodial interrogation process, the privilege requires that there be procedures fully effective in apprising persons *prior to* interrogation of their right to remain silent and ensuring that attempts to exercise the privilege *during* interrogation are fully honored. To provide "constitutional guidelines," the Court set forth specific warnings that must be given prior to interrogation and procedures that must be followed during interrogation as a constitutional minimum. The Court held that these measures, or other procedures at least as effective in apprising persons of their right to remain silent and assuring that exercise of such rights would be honored, must be provided to give effect to the privilege.

In subsequent years, the Court has continued to refer to *Miranda*'s specific requirements as constitutionally based. The Court has also applied *Miranda*'s holding to myriad cases arising in state courts, and on habeas review. While the Court has sometimes referred to these requirements as "prophylactic rules," it cannot be that they are not required by the Constitution. "Prophylactic" is not a synonym for "non-constitutional." If it were,

then for 33 years the Court has violated federalism and acted lawlessly in requiring States to comply with *Miranda*'s rules and numerous other prophylactic rules that are not required by the Constitution. Because *Miranda*'s rules have been applied against the States and are constitutionally required, neither Congress nor the States may ignore them. Section 3501 utterly fails to comply with *Miranda*'s constitutional rules. It fails to provide the warnings and additional procedures specified in *Miranda*, and makes no provision whatsoever for procedures at least as effective in apprising individuals of their right to remain silent and assuring that exercise of the right will be honored. Section 3501 is therefore unconstitutional.

Only the Supreme Court may alter *Miranda*'s requirements, and 33 years after *Miranda* was decided, principles of *stare decisis* counsel against doing so. *Miranda* has proved to be workable, is a ruling on which there has been considerable reliance and has not been overtaken by doctrinal developments or changes in its factual underpinnings. *Miranda* is a well-reasoned, principled decision. Moreover, it is one of the Court's most famous opinions of the twentieth century. *Miranda*'s specific holdings have been widely popularized through the media and accepted in the legal culture. Departing from them would erode public confidence in the legitimacy of the criminal justice system and the legitimacy of the Court's exercise of its authority.

ARGUMENT

I. *MIRANDA* ENUNCIATED A CONSTITUTIONAL RULE THAT CANNOT BE REVERSED BY CONGRESS.

A. *Miranda*'s Core Constitutional Holdings.

This Court's decision in *Miranda* was, first and foremost, a construction and analysis of what the Fifth Amendment requires in the context of custodial interrogations. In deciding *Miranda*, the Court was doing more than "judicially creat[ing] rules of evidence and procedure that are not required by the Constitution." J.A. 200. Rather, it announced three core constitutional holdings. *First*, the Court held that the Fifth Amendment "privilege [against self-incrimination] is fully applicable during a period of custodial interrogation." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

Second, the Fifth Amendment prohibition against compelled self-incrimination requires that the decision whether to speak to officers while in custody must be proven to be both intelligently made and entirely voluntary. Accordingly, interrogating officials must inform the individual of his rights and provide assurances that the individual's decision will be honored.

Third, the *Miranda* Court elaborated on the nature and content of the "concrete constitutional guidelines for law enforcement agencies and courts to follow," *id.* at 442, specifying the information that must be provided as a minimum constitutional threshold. Specifically, the Court held:

> [*p*]*rior to any questioning*, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, *provided the*

> *waiver is made voluntarily, knowingly and intelligently*. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning*. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, *the police may not question him*.

Id. at 444-45 (emphases added).

While the Court did not insist that its own wording of the warnings must be followed, it expressly held that alternative procedures must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467; see also *id.* at 444 (specifying either the Court's "procedural safeguards" or "other fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"); *id.* at 476 (specifying the Court's warnings or "a fully effective equivalent" to warn accused of rights and protect exercise thereof); *id.* at 478-79 (same); *id.* at 490-91 (same). Thus, these protections are part of our irreducible minimum protection embraced by the privilege against self-incrimination in the Fifth Amendment.

Too often, analyses of the *Miranda* decision focus on the precise formulation of the now famous warnings and fail to address the carefully crafted constitutional analysis which led to the rule.[7] While the Court invited alternative procedures, it did not invite procedures that dispensed with apprising persons in custody at the outset of their rights and assuring that their exercise of those rights would be honored. Moreover, the Court expressly rejected an after the fact "totality of the circumstances" test. Such procedures (including what Congress ultimately passed in

[7] *See generally* Stephen I. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987).

§ 3501) are constitutionally infirm because, even where an individual may be otherwise aware of his rights, warnings are nonetheless required for the individual must be assured by his interrogators that they will respect his exercise of his rights.

1. The Court's first core constitutional holding was to confirm that "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id.* at 467. In reaching this conclusion, the Court clarified issues raised in its prior holdings in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). See *Miranda*, 384 U.S. at 440, 463-66.[8] The Court held that "all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.* at 461, finding that the "question, in fact, could have been taken as settled in federal courts almost 70 years ago,

[8] In *Malloy* v. *Hogan*, the Court squarely held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States," 378 U.S. 1, 6 (1964), and therefore applied to an "interrogation" of the petitioner conducted as part of a state "inquiry" into alleged criminal activities. *Id.* at 12-14. One week later, in *Escobedo* v. *Illinois*, the Court held inadmissible all statements extracted during an interrogation where the accused had requested and been refused an opportunity to consult with counsel and had not been warned of his constitutional right to remain silent, finding that the accused had been denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments. 378 U.S. 478, 490-91 (1964). Among the prior opinions relied on in reaching this conclusion were the Court's holding in *Gideon* v. *Wainwright*, 372 U.S. 335, 342 (1963), that the Sixth Amendment applied to the states, and its holding in *Massiah* v. *United States*, 377 U.S. 201, 204 (1964), that the Sixth Amendment right to the aid of counsel applied "to an indicted defendant under interrogation by police in a completely extrajudicial proceeding."

when, in *Bram* v. *United States*, 168 U.S. 532, 542 . . . (1897), this Court held: '. . . wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person "shall be compelled in any criminal case to be a witness against himself." ' " *Id.* (second omission in original). The Court, however, granted certiorari in *Miranda* to address "problems" exposed in "debate" engendered by *Escobedo*, regarding "applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines" regarding such application. *Id.* at 440-41.

2. The Court's second core holding was that the Fifth Amendment requires that statements made during custodial interrogation are inadmissible at trial in the prosecution's case-in-chief unless, before making those statements, "the accused [is] adequately and effectively apprised of his rights and the exercise of those rights [is] fully honored." *Id.* at 467. This second holding emerged from the Court's lengthy review of the history of the privilege, see *id.* at 458-66. The Court emphasized that a decision to make a statement in any situation in which an individual has become a "suspect" or "the accused" must both be intelligently made and unfettered. See *id.* at 460 ("the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own free will' " (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964))); see also *id.* at 468 (the decision must be "intelligent"). Simply put, no decision is intelligently made where the decider is ignorant of the available options, and no choice is voluntary where an inquisitor withholds critical information about the choice.

The *Miranda* Court further recognized the simple reality that compulsion may come in many forms, not only those

traditionally associated with plainly unconstitutional "third degree" tactics. Instead, the risk of compulsion is inherent in any proceeding where an accused has been deprived of his freedom, taken to a strange place and subjected to questioning by those trained to elicit answers. When the subject of such a proceeding makes a decision to speak, the voluntariness—and reliability—of such a decision is suspect unless it can be shown that the subject had been made aware that he was free to do otherwise. This is true "whatever the background of the person interrogated," for even one who is aware of his rights needs reassurance that "he is free to exercise this privilege at that point in time." *Id.* at 469.

Accordingly, the constitutional command that an individual be free from compelled self-incrimination and that any waiver of such right be voluntary necessitates, at a minimum, that the individual be warned at the outset of interrogation of his rights and that the individual be told that his decision to invoke those rights will be honored. See *id.* at 444 (there must be "fully effective means . . . devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"); *id.* at 478-79 ("[p]rocedural safeguards must be employed to protect the privilege [that are] fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored"); *id.* at 490 (requiring "safeguards for the privilege . . . as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it").

This minimum threshold requirement supplanted the "totality of the circumstances" analysis that the Court had used under the Fourteenth Amendment to determine whether the statements made during custodial interrogation were voluntary. See, *e.g.*, *Michigan* v. *Tucker*, 417

U.S. 433, 441 (1974) ("[b]efore *Miranda* the principal issue in these cases was not whether a defendant had waived his privilege against compulsory self-incrimination but simply whether his statement was 'voluntary.' In state cases the Court applied the Due Process Clause of the Fourteenth Amendment"); *id.* at 442 ("it was not until this Court's decision in *Miranda* that the privilege against compulsory self-incrimination *was seen as the principal protection for a person facing interrogation*") (emphasis added).

3. The "concrete constitutional guidelines" which the Court delineated encompass the third core constitutional holding in *Miranda*. The Court justified each of the warnings required in *Miranda* as "absolute prerequisite[s]," 384 U.S. at 468, to interrogation on the constitutional grounds that they were necessary and sufficient conditions to the intelligent exercise of the privilege in a custodial context. *First*, the Court held that a warning that the accused has the right to remain silent is indispensable "for an intelligent decision as to its exercise" as well as "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id. Second*, the Court held that "[t]he warning of the right to remain silent *must* be accompanied by the explanation that anything said can and will be used against the individual in court." *Id.* at 469 (emphasis added). The Court explained: "[T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—*that he is not in the presence of persons acting solely in his interest.*" *Id.* (emphasis added).

Third, the Court recognized that the "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators," *id.*, and that "[e]ven

preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process." *Id.* at 470. To remedy this, the Court held that "an individual held for interrogation *must* be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation," *id.* at 471 (emphasis added), and noted that " 'the right to be furnished counsel does not depend on a request.' ". See *id.* (quoting *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962)). The Court held that "[a]n individual need not make a pre-interrogation request for a lawyer" for the right to counsel to attach to custodial interrogation. *Id.* at 470. "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." *Id.* at 470-71.

Fourth, the Court required that a person interrogated be informed that "if he is indigent a lawyer will be appointed to represent him." *Id.* at 473. This step was held to be necessary to assure that the accused was in a position knowingly to exercise or waive this right: "As with the warnings of the *right* to remain silent and of the *general right* to counsel, only by effective and express explanation to the indigent of this right can there be assurance *that he was truly in a position to exercise it.*" *Id.* (emphases added).

Although *Miranda* invited Congress and the States to develop other "fully . . . effective" procedures to "safeguard[] . . . the privilege," *id.* at 490, the Court emphasized that "unless we are shown other procedures which are *at least as effective* in *apprising accused persons of their right of silence* and in assuring a continuous opportunity to exercise it," *id.* at 467 (emphasis added), the alternative procedures would fall short of the Fifth Amendment's requirements. *Miranda* did not leave Congress free to sup-

plant the requisite warnings with procedures that altogether fail to "appris[e] accused persons" at the outset of interrogation of their right to remain silent, their right to counsel, and assurance that exercise of these rights would be honored.

B. The Court's Subsequent Application Of *Miranda* To The States And On Habeas.

The Court's jurisprudence following *Miranda* further demonstrates that this Court in *Miranda* established constitutional, not merely supervisory, rules. In numerous subsequent opinions, the Court has referred to *Miranda*'s rules as constitutional requirements and extensions of its holding as constitutionally based. See *Edwards* v. *Arizona*, 451 U.S. 477, 481-82 (1981) (explaining that "[i]n *Miranda* v. *Arizona*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination *required* that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney") (emphasis added).[9]

Perhaps the clearest indication that the Court has never regarded *Miranda* as resting simply on its supervisory powers is the fact that the Court consistently has applied the *Miranda* rules to cases arising in state courts. See,

[9] *See also Illinois* v. *Perkins*, 496 U.S. 292, 296 (1990) (*Miranda* rules rest on "the Fifth Amendment privilege against self-incrimination"); *Butler* v. *McKellar*, 494 U.S. 407, 411 (1990) (noting holding of *Arizona* v. *Roberson* "that the Fifth Amendment bars police-initiated interrogations following a suspect's request for counsel in the context of a separate investigation"); *Michigan* v. *Jackson*, 475 U.S. 625, 629 (1986) ("[t]he Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations"); *Moran* v. *Burbine*, 475 U.S. 412, 427 (1986) (*Miranda* is "our interpretation of the Federal Constitution").

e.g., *Stansbury* v. *California*, 511 U.S. 318, 322-27 (1994); *Minnick* v. *Mississippi*, 498 U.S. 146, 152-53 (1990); *Arizona* v. *Roberson*, 486 U.S. 675, 680-82 (1988). (Indeed, three of the four consolidated cases which comprised *Miranda* arose in state courts.) Although the Court has the authority to announce rules of procedure and evidence binding on federal courts, fundamental principles of federalism preclude the exercise of any such supervisory authority over the state courts. With respect to cases tried before state tribunals, the Court's "authority is limited to enforcing the commands of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991). The federal judiciary "may not require the observance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution." *Harris* v. *Rivera*, 454 U.S. 339, 344-45 (1981); see *McNabb* v. *United States*, 318 U.S. 332, 340 (1943) ("the power of this Court to undo convictions in state courts is limited to enforcement of those 'fundamental principles of liberty and justice' which are secured by the Fourteenth Amendment") (citation omitted) (quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)). Therefore, the Court's continued application of *Miranda*'s exclusionary rule in state cases is conclusive proof that *Miranda* rests on constitutional underpinnings.[10] The Fourth Circuit's effort cavalierly to dismiss this fact as "an interesting academic question . . . [that] has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution," J.A. 208 n.21, simply disregards the profound importance of this

[10] Indeed, *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), cases relied upon by the panel to support its conclusion that *Miranda* is not a constitutionally based decision, arose in state courts. In both decisions, the Supreme Court reaffirmed *Miranda*'s basic conclusion that unwarned statements must be excluded from the prosecution's case-in-chief. *Tucker*, 417 U.S. at 445; *Elstad*, 470 U.S. at 307.

limit on the Court's authority. In effect, the court of appeals is suggesting that this Court has exceeded its authority in scores of cases over the past 30 years. This is no matter of mere academic musings.

Finally, the Court has held that claims that a conviction rests on statements obtained in violation of *Miranda* are cognizable on federal habeas review. *Withrow* v. *Williams*, 507 U.S. 680, 690-95 (1993). Habeas review is only available for claims that a person "is in custody in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. § 2254(a). *Miranda* certainly does not involve laws or treaties. Thus, the Court's holding in *Withrow* depends on the conclusion that the requirements of *Miranda* arise from and protect constitutional rights. In reaching its conclusion, the Court rejected the government's argument that since the *Miranda* rules "are not constitutional in character, but merely 'prophylactic,'" federal habeas review should not extend to claims based on violations of these rules. *Withrow*, 507 U.S. at 690. The Court declined to reach this conclusion and observed that *Miranda* safeguards a "fundamental trial right." *Id.* at 691.

C. *Miranda*'s "Prophylactic" Rules Have Constitutional Weight.

The Fourth Circuit, citing no support, relies on the theory that "prophylactic" rules created by the Court to protect rights enumerated in the Constitution are subject to reversal by Congress and the States. See J.A. 203, 207. First, the Fourth Circuit's theory is clearly at odds with *Miranda*'s express holding that Congress and the States could not override its requirements. See, *e.g.*, *Miranda*, 384 U.S. at 490 (Congress and the States must adopt "safeguards for the privilege" that are "fully effective . . . in informing accused persons of their right of silence and in

affording a continuous opportunity to exercise it"). While the Court in subsequent opinions has referred to *Miranda*'s specific warnings as "prophylactic" rules that safeguard constitutional rights, that does not mean that *Miranda*'s holdings lack constitutional force and may be overridden by Congress. Those same opinions recognize the constitutional underpinnings of the rules and do not hold, or even suggest, that Congress and the States are free to reverse them. Moreover, the Court's many other opinions involving "prophylactic" rules that guard fundamental constitutional rights do not suggest that Congress and the States are free to override such rules.

Miranda's four warnings are flexible only in the sense that that they may be replaced by procedures "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467. They create a safe harbor when followed. But that does not mean the legislative branches are precluded from devising equally effective methods of protecting the privilege against self-incrimination. *Miranda* itself noted that one alternative procedure that would meet this requirement would be to require "[t]he presence of counsel" during interrogation. *Id.* at 466. Nonetheless, *Miranda* established a constitutional minimum to protect the right to silence and to counsel during custodial interrogation—*i.e.*, *Miranda*'s procedures or "other fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." *Id.* at 444; see *id.* at 467, 476, 478-79.

Indeed, the specific opinions the Fourth Circuit relied upon referring to the *Miranda* rules as "prophylactic" recognized the constitutional underpinnings of *Miranda*'s rules. In *Tucker*, 417 U.S. at 444, the Court held that the specific *Miranda* warnings were "not themselves *rights*

protected by the Constitution but were instead measures to *insure* that the right against compulsory self-incrimination was protected," *id.* (emphases added), and referred to *Miranda*'s own explanation that its prescribed warnings were not a " 'constitutional straightjacket.' " *Id.* (quoting *Miranda*, 384 U.S. at 467). Thus, *Tucker* is entirely consistent with *Miranda*'s understanding that the specific safeguards it prescribed were not required by the Constitution in the sense that other "procedures" or "solution[s]" could replace them so long as they were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467.

In *New York* v. *Quarles*, 467 U.S. 649, 654 (1983), the Court simply reiterated *Tucker*'s observation that the "Miranda warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' " *Id.* at 654 (alteration in original) (quoting *Michigan* v. *Tucker*, 417 U.S. 413, 444 (1974)). In *Elstad*, 470 U.S. at 318, the Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." In reaching this conclusion, the Court observed that *Miranda*'s exclusionary rule is prophylactic in that it "*serves* the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself." *Id.* at 306 (emphasis added).[11] The Court nonetheless reaffirmed that a *Miranda* violation "affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." *Id.* at 306 n.1.

[11] The Court has also adopted constitutional prophylactic rules that predictably overprotect constitutional rights in a variety of other settings. *See, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974) (explaining that, even though "there is no constitutional value in false statements of fact," the Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny nevertheless "extended a measure of strategic protection to defamatory falsehood" in cases involving public officials and public figures); *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (setting forth "procedural safeguards designed to obviate the dangers of a censorship system" with respect to motion picture obscenity).

Each of these cases does no more than adjust the contours of the prophylaxis. When, for example, public safety or good faith on the part of officials warrant limitations on the scope of the underlying constitutional provision, this Court (and not Congress or state legislatures) has carefully crafted adjustments.[12] The existence of such cases does not strip *Miranda*'s requirements of constitutional dimension. If it did, and if *Miranda*'s minimum threshold requirements represented nothing more than an exercise of the Court's supervisory powers, then there is no reason why such requirements should have been applicable to the States. It is fallacious to reason, as the Fourth Circuit has, that because this Court has made such adjustments to the prophylactic reach of *Miranda*, the Court was merely exercising a supervisory power rather than applying a constitutional requirement to a new type of circumstance.

Moreover, *Miranda* is just one of many instances in which the Court has announced prophylactic rules to protect underlying constitutional rights. For example, to "avoid[] otherwise difficult line-drawing problems" and

[12] *See, e.g., Tennessee* v. *Street*, 471 U.S. 409, 417 (1985) (confession that is inadmissible under *Bruton* rule is admissible for impeachment); *United States* v. *Leon*, 468 U.S. 897, 913 (1984) (officer's reasonable reliance on search warrant ultimately held invalid does not bar admission of evidence obtained in prosecution's case-in-chief); *Oregon* v. *Haas*, 420 U.S. 714, 721 (1975) (discussing why evidence obtained in violation of Fourth Amendment or *Miranda* is admissible for impeachment purposes).

adopt a test with "relatively few problems of proof," the Court has established a prophylactic rule that a permanent physical occupation is per se a taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982). The Court has created numerous additional "prophylatic constitutional rules," *Michigan* v. *Payne*, 412 U.S 47, 53 (1973), regarding criminal procedure. See *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969) (to protect Due Process Clause right to appeal, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear," or vindictiveness will be presumed); *Michigan* v. *Payne*, 412 U.S. at 53 (explaining that "[i]t is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce*, that their . . . application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation"); *Blackledge* v. *Perry*, 417 U.S. 21, 28-29 (1974) (although there was "no evidence that the prosecutor in this case acted in bad faith," it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right of appeal by bringing a more serious charge against him prior to the trial *de novo*); *Maine* v. *Moulton*, 474 U.S. 159, 168 (1985) (requiring suppression of accused's statements, relating to pending charges at trial, when obtained by law enforcement officials conducting surveillance of accused relating to new or additional crimes, despite assertions of the legitimate reasons for the surveillance, to protect the accused's Sixth Amendment right to communicate only through counsel with police regarding the pending charges); *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986) (holding that where "police initiate an interrogation after the defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's [Sixth Amendment] right to

counsel for that police-initiated interrogation is invalid" and resulting confessions inadmissible); *Michigan* v. *Harvey*, 494 U.S. 334, 345-46 (1990) (holding that a statement inadmissible in prosecution's case-in-chief under *Michigan* v. *Jackson*'s "prophylactic rule" may nonetheless be used "to impeach a defendant's false or inconsistent testimony"). Nothing in the language of those decisions suggests that their prophylactic character makes these rules not constitutionally required. Indeed, the fact that a rule is strongly prophylactic often reflects the importance of the underlying constitutional right and of preventing less than fully intelligent waiver of such a right. As the Court has explained, "we should 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Jackson*, 475 U.S. at 633 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

In sum, it cannot be that prophylactic rules designed to protect constitutional rights and applied against the States are not constitutionally required. "Prophylactic" is not a synonym for "non-constitutional." If it was, and Congress could alter *Miranda*'s rules, then for 33 years the Court has engaged in the rankest violation of federal-State relations and acted utterly lawlessly by requiring States to comply with *Miranda* rules that are not constitutionally required, and requiring compliance with a host of other prophylactic rules not required by the Constitution.

D. Section 3501 Is Constitutionally Infirm.

In enacting 18 U.S.C. § 3501, Congress attempted to secure the admissibility in federal courts of statements that would otherwise be suppressed under this Court's decision in *Miranda*.[13] By its terms, § 3501 makes "whether or

[13] *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. Congress also explicitly sought to overrule the now displaced holding of *Escobedo* v. *Illinois*, 378 U.S. 478, 490-91 (1964), which

not [a] defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him" simply one of many factors a trial judge may consider in determining whether a statement is "voluntary" and hence admissible. 18 U.S.C. § 3501(b)(3). Similarly, whether a defendant was advised of his right to counsel is but another factor to be considered. *Id.* § 3501(b)(4). The purpose and effect of § 3501 would be to establish the totality of the circumstances test for determining the admissibility of custodial statements, despite *Miranda*'s rejection of that test. Section 3501 therefore squarely conflicts with *Miranda*'s core holding that "the accused must be . . . apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467.

In addition, because § 3501 does not require the four specific warnings and additional procedures outlined in *Miranda*, nor does it provide procedures "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," *id.*, it fails to meet the minimum protections *Miranda* determined the Constitution required. Section

---

applied the Sixth Amendment right to counsel to interrogations conducted as part of a police investigation that had "focus[ed]" on a particular suspect in police custody. Although not raised in the Congressional debate (nor addressed in the Fourth Circuit's opinion below), § 3501 would also appear to render admissible statements obtained in violation of the holdings in *Massiah*, 377 U.S. at 206 (suppressing under the Sixth Amendment's right to counsel statements obtained through government efforts to "deliberately elicit[]" incriminating statements after adversarial proceedings have commenced) and *Wong Sun* v. *United States*, 371 U.S. 471, 484-87 (1963) (holding that even voluntary statements may be inadmissible if derived from an illegal arrest or search or otherwise the "fruit" of a Fourth Amendment violation). *See* Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?* 85 Cornell L. Rev. n.5 (forthcoming 2000).

3501's procedures are not "as effective" as those specified in *Miranda*. Section 3501 does not require "appropriate safeguards *at the outset* of the interrogation," *id.* at 457 (emphasis added), nor does it impose *any* affirmative obligation upon the part of officials to ensure that any statements are "truly the product of free choice." *Id.*

Similarly, § 3501's procedures, by failing to require that accused persons be informed of their right to silence and right to counsel, fail to require the knowing and intelligent waiver of these constitutional rights. *Miranda* specifically held that the "high standards of proof for the waiver of constitutional rights . . . applied to in-custody interrogation." *Id.* at 475 (citation omitted). The Court "ha[s] adhered to the principle that nothing less than the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights." *Minnick*, 498 U.S. at 160 (Scalia, J., dissenting). Section 3501 conflicts with *Miranda*'s requirement that the government demonstrate knowing and intelligent waiver of the right to remain silent and to have assistance of counsel during custodial interrogation.

Congress has no power to overrule the Court's interpretations of the Constitution. *City of Boerne* v. *Flores*, 521 U.S. 507, 517-21 (1997). If that is the desired end, the proper course is to pursue the constitutional amendment process. Because § 3501 clearly conflicts with *Miranda*, and *Miranda* represents the Court's interpretation of the Constitution, § 3501 is invalid. If Congress could overturn any Supreme Court interpretation of the Constitution it disliked simply by enacting contrary legislation, then the Constitution would no longer be "superior, paramount law" but "on a level with ordinary legislative acts, and like other acts . . . alterable when the legislature shall please

to alter it." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

II. THERE IS NO REASON TO DISLODGE *MIRANDA*'S CONSTITUTIONAL RULING.

Principles of *stare decisis* dictate that *Miranda* not be overruled now, 33 years after the decision. *Miranda* constituted a fully warranted exercise of the Court's power to interpret the Constitution which should not be disturbed. *Miranda* involved elucidation of a fundamental right that has become deeply ingrained in the Court's own subsequent opinions, in law enforcement practices, and in the public's understanding of the Constitution in a criminal justice setting.

The doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillary*, 474 U.S. 254, 265-66 (1986). Adhering to precedent " 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854 (1992). Although "the rule of *stare decisis* is not an 'inexorable command,' " *id.*, "[e]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.' " *United States* v. *International Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring)).

Traditional considerations in *stare decisis* analysis are whether the "governing decisions are unworkable," *Payne* v. *Tennessee*, 501 U.S. at 827, whether the governing decisions are subject to a kind of reliance that would lead to special hardship were those decisions abandoned, see *id.* at 827-28; *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *Casey*, 505 U.S. at 854-56, whether the law's development in intervening years has rendered the prior holding a "remnant of abandoned doctrine," *Casey*, 505 U.S. at 855; see *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-74 (1989); whether any factual premises underlying the prior holding have so changed as to render the holding irrelevant or unjustifiable, see *Casey*, 505 U.S. at 855; *Vasquez*, 474 U.S. at 266; and whether the governing decision was "unsound in principle." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). Each of these considerations is addressed below. Each demonstrates that *Miranda* should be reaffirmed.

A. Workability.

Miranda's holdings have in no sense proven "unworkable" in practice.[14] To the contrary, *Miranda's* core holding that there must be procedures to apprise an individual in custody of his rights and its specific rules have proven easy to administer by law enforcement officers and the courts. The United States has represented that "[f]ederal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to an-

---

[14] *Cf. Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (finding determination of whether particular governmental function is " 'integral' " or " 'traditional' " to be "unsound in principle and unworkable in practice").

answer questions." Gov't Pet. Br. 21. This Court has repeatedly held that a virtue of *Miranda* is the ease and clarity of its application by police and courts. See *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986) ("[a]s we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application") (second alteration in original); *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984) (noting "the simplicity and clarity" of *Miranda*); see also *New York* v. *Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in and dissenting in part) (*Miranda* rules have " 'afforded police and courts clear guidance on the manner in which to conduct a custodial investigation.' "). Even 19 years ago, Chief Justice Burger declared: "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, [nor] disparage it . . . at this late date." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

Although the Court has noted that *Miranda*'s requirements may have led in some instances to the exclusion of statements that were not the product of physical or psychological coercion,[15] application of *Miranda* has not been shown to undermine law enforcement. Indeed, it is just as likely that the simplicity and lack of ambiguity in a *Miranda* waiver form have resulted in the admission of statements that might otherwise have been found to be compelled. At bottom, the "judgment and experience of federal law enforcement agencies is that *Miranda* is workable in practice and serves several significant law enforcement objectives." Gov't Pet. Br. 20. The minimum burdens *Miranda* imposes are in fact likely outweighed by the decision's benefits. See *Fare* v. *Michael C.*, 442 U.S. 707,

[15] *See, e.g., Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990) (*Miranda*'s exclusionary rule "result[s] in the exclusion of some voluntary and reliable statements").

718 (1979) (noting that the "gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts"). The benefit to the administration of justice is reflected in the fact that some federal agencies have expanded use of *Miranda* warnings to non-custodial settings. See Gov't Pet. Br. 21-22.

The ease with which *Miranda* is applied by courts contrasts markedly with the difficulties that courts experienced attempting to apply the former Due Process Clause totality of the circumstances test for voluntariness, as even the dissent in *Miranda* reveals. See *Miranda* v. *Arizona*, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (describing that in "more than 30 full opinions" "the voluntariness rubric was . . . never pinned down to a single meaning but on the contrary [the Court] infused it with a number of different values. . . . The outcome was a continuing re-evaluation on the facts of each case of *how much* pressure on the subject was permissible") (citation omitted).

B. Reliance.

While the Court has held that the "classic case for weighing reliance heavily in favor of following [an] earlier rule occurs in the commercial context," *Casey*, 505 U.S. at 855-56 (citing *Payne* v. *Tennessee*, 501 U.S. at 828), the Court has also consideerd whether reversal of a precedent would result in "significant damage to the stability of the society governed by it." *Id.* at 855. For nearly thirty-five years, *Miranda*'s requirements have shaped law enforcement training, police conduct, the provision of counsel to those subjected to custodial interrogation and public expectations with respect to custodial interrogation. The *Miranda* warnings themselves have been widely popularized, and for good reason: they promote a percep-

tion of fairness, integrity and respect for the Constitution in the criminal justice system. See Gov't Pet. Br. 36.

C. Subsequent Doctrinal Developments.

It cannot be said that "intervening development of the law, through . . . the growth of judicial doctrine," has removed *Miranda*'s doctrinal underpinnings. *Patterson*, 491 U.S. at 173. Just the opposite is true. The Court has consistently premised subsequent decisions on the continuing validity of *Miranda*'s core holding requiring the suppression of unwarned statements in the prosecution's case-in-chief. See, *e.g.*, *Minnick* v. *Mississippi*, 498 U.S. 146, 156 (1990) (suppressing statement given after defendant had requested and consulted with counsel, but while counsel was not present); *Pennsylvania* v. *Muniz*, 496 U.S. 582, 599 (1990) (suppressing unwarned response to question asked during station house sobriety test); *Berkemer*, 468 U.S. at 434 (holding unanimously that *Miranda* applies to questioning on misdemeanor charges).

In fact, the Court has expanded and clarified *Miranda*'s requirements with respect to the exclusion of unwarned statements in the prosecution's case-in-chief. For example, *Miranda* held that the police must terminate interrogation of an accused in custody if the accused requests assistance of counsel. 384 U.S. at 474. The Court reinforced the protections of *Miranda* in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which held that once the accused requests counsel, officials may not reinitiate questioning "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police." *Id.* at 484-85. *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990). In *Minnick*, the Court reinforced *Edwards*, holding that "when counsel is

requested, interrogation must cease, and officials may not reinitiate interrogation *without counsel present, whether or not the accused has consulted with his attorney*." 498 U.S. at 153 (emphasis added). The Court stated that its holding in *Minnick* was consistent with *Miranda*'s observation that "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.* at 154 (quoting *Miranda*, 384 U.S. at 470).

The Court's subsequent opinions have never suggested that Congress or the States could ignore *Miranda*'s core holdings and adopt procedures, such as those embodied in § 3501, that fail to require apprising accused persons of their Fifth Amendment rights. To the contrary, the Court has repeatedly imposed a heightened standard for waiver during custodial interrogation of the right to remain silent and the right to counsel. "The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, [the Court] ha[s] held, that it 'requir[es] the special protection of the knowing and intelligent waiver standard.' " *Davis* v. *United States*, 512 U.S. 452, 458 (1994) (third alteration in original) (quoting *Edwards* v. *Arizona*, 451 U.S. 477, 483 (1981)).

The Court has, under certain circumstances, continued to examine the application of *Miranda*'s exclusionary requirements to situations not considered in *Miranda*. The Court has also declined to extend *Miranda*'s exclusionary requirements to situations or types of evidence not considered in *Miranda*. See, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. 433, 449 (1974) (declining to extend exclusionary rule to testimony of witness discovered as a result of accused's statements); *Oregon* v. *Elstad*, 470 U.S. 298, 314-17 (1985) (declining to suppress statement made after

warnings and valid waiver of rights where police had obtained earlier voluntary but unwarned statement); *Quarles*, 467 U.S. at 659-60 (refusing to suppress weapon found as a result of unwarned statements based on public safety exception to *Miranda*). The Court's carefully justified decisions not to extend *Miranda* in certain contexts in no way suggest that *Miranda*'s holdings are a "doctrinal anachronism." *Casey*, 505 U.S. at 855.

D. Unchanged Factual Premises.

In the intervening years since *Miranda*, the characteristics and circumstances of police interrogations have not changed in a manner that robs *Miranda*'s rule "of significant application or justification." *Casey*, 505 U.S. at 855. A cursory review of reported decisions demonstrates the point. See, *e.g.*, *Cooper* v. *Dupnik*, 963 F.2d 1220, 1224 (9th Cir. 1992) (*en banc*) (according to prearranged plan, officers ignored subject's requests for counsel and interrogated him for four hours in hopes of obtaining a confession which they knew would be inadmissible, but could be used for impeachment); *Weaver* v. *Brenner*, 40 F.3d 527, 537 (2d Cir. 1994) (officers who had probable cause for arrest nonetheless conducted allegedly coercive interrogation in order to obtain confession). Even if, overall, instances of "brutality" and physical coercion may have declined since 1966, any such decline is likely the result of adoption of *Miranda*'s rule requiring "procedures . . . effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," 384 U.S. at 467, thus fulfilling the Court's hope, if not prophecy, that the "proper limitation upon custodial interrogation" set forth in *Miranda* would "eradicate[]" physical coercion "in the foreseeable future." *Id.* at 447.

Moreover, it cannot be said that the psychological coercion that *Miranda* found inherent in interrogations of

citizens no longer exists. Custodial interrogations are still largely conducted in private, with accused citizens cut off from relatives, friends and attorneys. Individuals are still "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." *Id.* at 457. This Court's own cases reflect this fact. See, *e.g.*, *Minnick*, 498 U.S. at 153-54 ("The case before us well illustrates the pressures, and abuses, that may be concomitants of custody. . . . [T]hough [petitioner] resisted, he was required to submit to both the FBI and the [Sheriff] Denham interviews."). Put simply, the nature of the interrogation process has not changed so markedly since issuance of *Miranda* as to rob the Court's decision of significant application and justification.

Even were it found that *Miranda* has been so successful that most persons subjected to interrogation are aware of their right to remain silent, the *Miranda* warnings retain their importance. The warnings "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." 384 U.S. at 468. Further, *Miranda*'s procedures are necessary to ensure that an accused's attempt to exercise his rights is "fully honored." *Id.* at 467.

E. *Miranda* Is Not "Unsound In Principle."

Miranda's holdings are certainly neither unreasoned nor "unsound in principle." *Garcia*, 469 U.S. at 546-47. To the contrary, the decision was a proper act of constitutional interpretation.[16] First, *Miranda*'s minimum threshold requirements are consistent with the text and history of the Fifth Amendment. Second, they flow logically from, and closely match, the scope of the underlying Fifth

[16] While the method and result of the constitutional analysis were routine, *Miranda* was remarkable in that the Court interpreted a "fundamental" right at the core of our democratic system.

Amendment right. Third, these requirements were a natural outgrowth of judicial precedent and law enforcement experience. And fourth, having proven to be far easier to administer in courts, and by law enforcement, *Miranda*'s minimum requirements more effectively serve the purposes of the Fifth Amendment than the totality-of-the circumstances test.

First, *Miranda*'s minimum threshold requirements are consistent with the text of the Fifth Amendment, which states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V (App. 1a). While expressed as a limitation on government power, the Fifth Amendment's prohibition against government efforts to coerce an individual to make incriminating statements necessarily means that the individual has an affirmative right to remain silent, and any waiver must be knowing, intelligent, and voluntary. See *Miranda*, 384 U.S. at 465. *Miranda*'s requirements simply assure that individuals can freely choose to exercise the right to remain silent.

The history of the Fifth Amendment also supports *Miranda*'s minimum threshold requirements. As the Court has noted, the Framers likely understood the Fifth Amendment to reflect common law rights. See *United States* v. *Balsys*, 118 S. Ct. 2218, 2232 & nn.13, 14 (1998). The Framers certainly understood that the common-law and Constitutional rights against self-incrimination not only were part of a complex of other trial rights, but also were *evolving* rights that changed as criminal procedures developed.[17] The *Miranda* Court's crafting of the minimum

[17] *See* Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination* 109, 136-41 (R.H. Helmholz et al. eds., 1997) ("*The Privilege*"); Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins, in The Privilege* 145, 148-59;

threshold requirements in light of contemporary practices in the criminal justice system is fully consistent with this tradition. In addition, the core aspects of *Miranda*'s requirements echo views at the time of the framing. For example, it was understood that the privilege against self-incrimination, among other things, entitled a defendant to remain silent, rather than answer questions under oath posed by a government interrogator before trial.[18] And by the mid-nineteenth century, interrogators in both America and England advised defendants of their right to remain silent.[19] In that manner, too, *Miranda*'s requirements are consistent with the historical understanding of the right.[20] And more fundamentally, throughout its his-

United States v. *Balsys*, 118 S. Ct. 2218, 2223 (1998); *cf. Miranda*, 384 U.S. at 460; *id.* at 507-08 (Harlan, J., dissenting).

[18] *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective, in The Privilege* 181, 192.

[19] *See* Alschuler, *supra* at 198.

[20] The historical record is admittedly less clear as to the extent to which, at the time of the framing, interrogators could require defendants to make *unsworn* pretrial statements. Although the Marian committal statute of 1555 directed magistrates to interrogate suspects, and this practice was carried over into the manuals distributed to justices of the peace in Colonial America (*see* John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, in The Privilege* 82, 91-94; Moglen, *supra* at 116-17), there is evidence that commentators and a number of practitioners concluded that the right to remain silent applied to unsworn pre-trial statements as well. Moglen, *supra* at 141-43; Langbein, *supra* at 97. Moreover, it would be inappropriate to read the Fifth Amendment right as merely prohibiting the specific practices that were prohibited by statute or the common law at the time of its adoption. First, such a venture is risky, because the historical record is spare and the Framers' understanding of the precise scope of the right is unclear. R.H. Helmholz, *Introduction, in The Privilege* 1, 11; Moglen, *supra* at 136-38. Second, as noted in the text, the right against self-incrimination was part of a cluster of other trial rights and was itself an evolving right that changed as criminal procedures

tory, the principle against self-incrimination has stood as an expanding bulwark to protect the private interests enunciated by *Miranda*, including guarding individual conscience against government intrusion.[21]

Second, *Miranda*'s minimum threshold requirements closely adhere to the scope of the underlying Fifth Amendment right. While phrasing the principle in somewhat different ways, the Court has repeatedly held for over a century, both before and after *Miranda*, that the "Fifth Amendment guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). Thus, the prohibition against "compelled" statements means that the statement must be "truly the product of free choice." *Miranda*, 384 U.S. at 457, 458.[22] That is, the

---

changed. Third, to return to the practices at the time just before the Framing would be to revert to a world in which defendants were prohibited from testifying under oath on their own behalf, Langbein, *supra* at 88; Alschuler, *supra* at 198, which would require overruling *Rock* v. *Arkansas*, 483 U.S. 44 (1987); where, because counsel was generally unavailable as a matter of right or practice, defendants were effectively *required* to speak as unsworn advocates on their own behalf (which of course rendered any right against self-incrimination largely meaningless), Langbein, *supra* at 82-88; Alschuler, *supra* at 194-95, which would require overruling not only countless Fifth Amendment cases, but also *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); and where the trier of fact could make unfavorable inferences from the defendants' failure to speak, Langbein, *supra* at 92, which would require overruling *Griffin* v. *California*, 380 U.S. 609 (1965).

21 *See, e.g.*, R.H. Helmholz, *The Privilege and the Jus Commune: The Middle Ages to the Seventeenth Century, in The Privilege* 17, 21-29, 44; Charles M. Gray, *Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries, in The Privilege* 47, 61-63; Langbein, *supra* at 103, 108.

22 *See Withrow* v. *Williams*, 507 U.S. 680, 689 (1993); *Doe* v. *United States*, 487 U.S. 201, 214 n.12 (1988); *Carter* v. *Kentucky*,

individual must make a knowing, intelligent, and voluntary choice not to remain silent. See, *e.g.*, *id.* at 465. Given this scope of the underlying right, as well as the nature of custodial interrogation, it only makes sense that the individual be reminded of his right to remain silent and that other safeguards be put in place to assure that the individual's right is observed. See *id.* at 469-75.

Third, *Miranda*'s holding was the natural outgrowth of more than 30 years of judicial experience with the totality-of-the-circumstances test. On the one hand, it *continued* the natural advancement in the Court's understanding of the nature of compulsion, which, as the principal dissent in *Miranda* noted, had evolved to require "close attention to the individual's state of mind and capacity for effective choice." *Id.* at 507 (Harlan, J., dissenting); see also, *e.g.*, *Colorado* v. *Connelly*, 479 U.S. 157, 164 (1986) (Rehnquist, C.J.); *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960). It also was faithful to the Court's longstanding admonition that the Fifth Amendment right be generously interpreted. See *Miranda*, 384 U.S. at 461 (citing cases);

---

450 U.S. 288, 304 (1981); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("It is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will' than Mincey's."); *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968) ("Considering the totality of these circumstances, we do not think it credible that petitioner's statements were the product of his free and rational choice."); *Culombe* v. *Connecticut*, 367 U.S. 568, 583 (1961) ("[A]n extra-judicial confession, if it was to be offered in evidence against a man, must be the product of his own free choice."); *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958) ("It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice.'") (footnotes omitted); *Lisenba* v. *California*, 314 U.S. 219, 241 (1941) (no evidence that statements "were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer"); *Bram* v. *United States*, 168 U.S. 532, 549 (1897) ("accused must be free of hope or fear in respect to the crime charged").

id. at 508 (Harlan, J., dissenting) (noting that the trend in the Court's decisions was "usually in the direction of restricting admissibility").

On the other hand, based upon 30 years of judicial experience, the *Miranda* Court *rejected* the totality of the circumstances test for measuring compulsion under the Fifth Amendment. In over 30 cases in as many years, the Court's analysis constantly changed, see *id.* at 507-08 (Harlan, J., dissenting), and the Court recognized that, given the proper focus on the mental state and capacity of the accused, continuing to engage in a totality-of-the circumstances analysis would involve pure "speculation." *Id.* at 468-69. Yet, this was not all. Even if the speculative exercise could be undertaken, *Miranda* also held that it was necessary for officials to inform even a suspect aware of his rights that his interrogators—these particular interrogators—themselves understood and would respect his rights. *Id.* This further requirement also flows from the need to ensure an unfettered choice. At bottom, the inquiry necessary under a "totality of the circumstances" test, in order to ensure a knowing and voluntary waiver, would look no further than the "ascertainable fact" of whether the accused had been apprised of his rights. Thus, the Court quite properly recognized that *Miranda*'s minimum requirements were the only appropriate response.

Similarly, *Miranda*'s minimum threshold requirements were based on the Court's understanding of the extensive practical experience of law enforcement. On the one hand, the core requirement of apprising the accused of his rights and safeguarding exercise of those rights, as well as the specific warnings, were based on similar rules in place for federal enforcement personnel. See *id.* at 481-86. On the other hand, the imposition of the requirements as a matter of constitutional law reflected the

Court's own institutional experience in analyzing the nature of police interrogations, *id.* at 448, 456, as well as its understanding of the difficulty of reconstructing what actually occurs during interrogations, see *id.* at 448. Moreover, the *Miranda* Court was mindful to minimize the burden imposed on law enforcement—all it required were warnings and attendant procedural safeguards, with which law enforcement could easily comply. It further provided the political branches of both the States and federal government with flexibility to adopt alternative procedures, as long as they complied with the constitutional requirements that the accused be informed of his or her rights through the use of procedures as fully as effective as those announced by the Court.

Finally, over 30 years of additional experience since *Miranda* have proven that *Miranda*'s minimum requirements better serve the policies underlying the Fifth Amendment. While the Fifth Amendment serves a number of purposes, at bottom, it serves to protect "the dignity and integrity of its citizens," by striking a "'fair state-individual balance.'" *Id.* at 460 (quoting 8 Wigmore, *Evidence* 317 (McNaughton rev. 1961); see *Balsys*, 118 S. Ct. at 2232 (balancing private and governmental interests in determining the scope of the Fifth Amendment right). *Miranda*'s requirements strike a fairer balance than the totality-of-the-circumstances test. These minimum requirements better serve law enforcement by providing a clear-cut rule for interrogating witnesses, rather than subjecting police to second guessing based on a more amorphous totality-of-the-circumstances test. They better serve the judiciary by providing a test that is more easily and consistently administered, rather than reconstructing all of the circumstances of an interrogation and attempting to divine the defendant's state of mind. They better serve the individual by helping to assure that the indi-

vidual is aware of his rights and that those rights are respected. And adherence comes at little cost—it only requires that the warnings be administered, something that is an extraordinarily simple act.

F. Considerations That Transcend Traditional Factors.

Miranda has become one of the Court's most famous opinions of the twentieth century. Where the rules of cases have found " 'wide acceptance in the legal culture,' " this "is adequate reason not to overrule these cases." *Mitchell* v. *United States*, 119 S. Ct. 1307, 1316 (1999), (Scalia, J., dissenting). *Miranda*'s widespread acceptance, however, extends far beyond the legal culture. *Miranda*'s specific holding has become widely popularized through television and film and hence is emblazoned on the public's consciousness. Whatever concerns arose immediately in the aftermath of *Miranda* as to guilty defendants being released on a technicality have been replaced by an abiding respect for *Miranda* rights. The public correctly understands that the Court held in *Miranda* that to protect an individual's constitutional right to remain silent, law enforcement officers must inform suspects subjected to interrogation of their right to remain silent, that what they say can and will be used against them, that they have a right to an attorney, and if they cannot afford one, an attorney will be appointed for them, and that law enforcement officers must honor a suspect's request to remain silent or to have counsel.

Adherence to *Miranda*'s requirements has promoted public confidence that law enforcement officers and the courts are treating individuals subjected to custodial interrogation in a similar, fair and lawful manner that respects their constitutional right to remain silent. Overruling *Miranda* would thus erode public confidence that police and the courts are treating persons subjected to custodial interro-

gation in a manner that appropriately and fairly respects their constitutional rights. As the United States notes, law enforcement depends on citizen cooperation and support, and a step such as overruling *Miranda*, which could undermine that support, should not be taken lightly. See Gov't Pet. Br. 36.

Moreover, departing from *Miranda* would erode public confidence in the legitimacy of the Court's elucidation of constitutional principles. "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Casey*, 505 U.S. at 865. Because neither the factual underpinnings of *Miranda*'s central holding nor subsequent evolution in the Court's jurisprudence justify abandoning *Miranda*, "the Court could not pretend to be reexamining [*Miranda*] with any justification beyond a present doctrinal disposition to come out differently." *Id.* at 864. A substantial reduction in the protections afforded by *Miranda* would, under these circumstances, needlessly upset "a carefully crafted balance designed to fully protect both the defendant's and society's interests." *Moran* v. *Burbine*, 475 U.S. 412, 433 n.4 (1986).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JAMES W. HUNDLEY *
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

PAUL F. WASHINGTON
75 Rockefeller Plaza
New York, New York 10019
(212) 484-6753

Counsel for Petitioner

January 28, 2000

* Counsel of Record

APPENDIX

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

18 U.S.C. § 3501 Admissibility of Confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the

defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence of absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention. *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance

to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.